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DIANA NELSON TANOJA

v.

PP

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-64-2008(B)]

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28 JANUARY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Appeal against conviction and sentence - Whether trial judge had prejudged case - Cautioned statement - Whether made voluntarily - Whether admissible - Whether there was infirmity in concurrent findings of facts - Whether appellate interference required - Whether appeal dismissed*

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This was an appeal by the appellant against the decisions of the High Court and the Court of Appeal in finding the appellant guilty of the offence of trafficking in dangerous drugs contrary to s. 39B of the Dangerous Drugs Act 1952 (the Act). At the end of the trial the appellant was convicted and sentenced to death by the High Court. His appeal to the Court of Appeal was dismissed. Hence the present appeal to this court. The grounds of appeal that were raised herein were (i) that the trial judge had prejudged the case before hearing the appellant's submission as the trial judge's decision was dated on the day the appellant entered his defence and not on the date the actual decision was delivered and (ii) the cautioned statement under s. 37A(1) of the Act which according to the appellant's counsel should not be admissible as the appellant did not understand the caution administered.

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Held (dismissing appeal against conviction and sentence)
Per Alauddin Mohd Sheriff PCA delivering the judgment of the court:

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(1) It was alleged by the counsel for the appellant the grounds of judgment was written on 18 January 2005 which was the date the appellant entered his defence. This court agreed with the decision of the Court of Appeal that the mentioned date was a typing error. It was observed that both counsel and DPP made their submissions on 26 January 2005 and the trial judge had handed down his decision immediately after that. Further, it was not mandatory for the trial judge to hear submission

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from counsel before giving his decision. The word 'may' in s. 181 of the Criminal Procedure Code indicates a discretion. Therefore, submission at the end of the defence case was discretionary. Submission was not evidence and hence the judgment was not defective. There was no basis for the appellant to allege that the trial judge had prejudged the matter even before submission was heard and this had prejudiced the rights of the appellant. (paras 29, 30, 31, 35, 36 & 39)

(2) In the trial within a trial, when cross-examined, the appellant told the court that he spoke 'broken English'. This suggested that the appellant could understand the English language. The purpose of having a trial within a trial was to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. Once a trial judge has come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it could be shown that such finding was flawed with a distinct material error of principle or the trial judge had clearly and wrongly evaluated the facts. There was no infirmity whatsoever in the concurrent findings of facts by the trial judge and the judges of the court of appeal which would require appellate interference. The ruling on the admissibility of the cautioned statement by the trial judge was a correct one. The counsel's submission on this ground was devoid of merit. (paras 51, 52, 53, 54, 55 & 56)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dan Mahkamah Rayuan dalam memutuskan perayu telah melakukan kesalahan mengedar dadah berbahaya yang bertentangan dengan s. 39B Akta Dadah Berbahaya 1952 (Akta itu). Di akhir perbicaraan, perayu disabit dan dikenakan hukuman mati oleh Mahkamah Tinggi. Rayuan perayu ke Mahkamah Rayuan ditolak. Oleh itu, perayu merayu ke mahkamah ini. Alasan-alasan rayuan yang dibangkitkan di sini adalah (i) bahawa hakim bicara telah membuat keputusan dahulu kes sebelum mendengar hujahan perayu kerana keputusan hakim bicara diberi pada tarikh dan hari yang sama perayu memasukkan pembelaan dan bukan pada tarikh dan hari masa sebenar keputusan kes diberikan dan (ii) pernyataan beramaran di bawah s. 37A(1) Akta yang menurut peguam perayu tidak sepatutnya diterima-masuk kerana perayu tidak memahami pernyataan beramaran tersebut.

Diputuskan (menolak rayuan terhadap sabitan dan hukuman)
Oleh Alauddin Mohd Sheriff PMR menyampaikan penghakiman mahkamah:

(1) Ia adalah hujahan peguam perayu bahawa alasan-alasan penghakiman telah ditulis pada 18 Januari 2005 iaitu tarikh perayu telah memasukkan pembelaannya. Mahkamah ini bersetuju dengan keputusan Mahkamah Rayuan bahawa tarikh tersebut adalah kesilapan menaip. Dapat dilihat kedua-dua peguam dan TPR telah memberi hujahan mereka pada 26 Januari 2005 dan hakim bicara telah memberi keputusan sebaik sahaja selepas itu. Seterusnya, ia bukanlah mandatori untuk hakim bicara mendengar hujahan-hujahan dari peguam sebelum memberi keputusannya. Perkataan 'may' di dalam s. 181 Kanun Prosedur Jenayah menunjukkan budi-bicara. Oleh itu, hujahan di akhir kes pembelaan adalah mengikut budibicara. Hujahan bukanlah keterangan dan oleh itu penghakiman tidak defektif. Perayu tidak mempunyai asas untuk berhujah bahawa hakim bicara telah membuat keputusan dahulu halperkara sebelum mendengar hujahan dan ini telah memprejudiskan hak-hak perayu.

(2) Di dalam satu perbicaraan dalam perbicaraan yang telah diadakan, apabila diperiksa-balas, perayu telah memberitahu mahkamah bahawa dia boleh bercakap 'broken English.' Ini menunjukkan bahawa perayu boleh memahami bahasa Inggeris. Tujuan mengadakan perbicaraan dalam perbicaraan adalah untuk memutuskan sama ada pernyataan beramaran dibuat secara rela tanpa dorongan, ugutan dan janjian. Sebaik sahaja hakim bicara membuat kesimpulan bahawa pernyataan itu dibuat secara suka rela, mahkamah rayuan sepatutnya lambat dalam mengganggu penemuan fakta melainkan ia boleh menunjukkan penemuan tersebut adalah cacat atau mempunyai kesalahan prinsip yang material atau hakim bicara telah membuat penilaian yang salah. Tiada apa-apa kelemahan di dalam dapatan-dapatan fakta bersama oleh hakim bicara dan hakim-hakim mahkamah rayuan yang memerlukan campur tangan rayuan. Keputusan mengenai isu terima-masuk pernyataan beramaran oleh hakim bicara adalah betul. Hujahan peguam atas alasan ini langsung tidak bermerit.

Case(s) referred to:
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 181(1)
Dangerous Drugs Act 1952, ss. 37A(1), (da)(ix), 39B

For the appellant - Sreekant Pillai (Paul Fernandez with him); M/s Lim Sreekant & Co
For the respondent - Saiful Edris Zainuddin DPP

[Appeal from Court of Appeal; Criminal Appeal No: B-05-20-2005]

Reported by Suhainah Wahiduddin

JUDGMENT

Introduction

Alauddin Mohd Sheriff PCA:

[1] This is an appeal by the appellant against the decisions of the High Court and the Court of Appeal in finding the appellant guilty of the offence of trafficking in dangerous drugs contrary to s. 39B of the Dangerous Drugs Act 1952 (the Act).

[2] The charge reads as follows:

> Bahawa kamu pada 22.8.2002 lebih kurang jam 7.45 pagi, di tempat pungutan bagasi, Carasul D, Aras 3, MTB KLIA, di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya jenis kokain seberat 508.6 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Pindaan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 (Pindaan 1980).

[3] At the end of the trial the appellant was convicted and sentenced to death by the High Court.

[4] His appeal to the Court of Appeal was dismissed.

[5] Hence the present appeal to this Honourable Court.

A **Facts Of The Case**

[6] At about 7.45am on 22 August 2002, PW3 led a police team from the Narcotics Department, Level 3 KLIA to make observation of passengers, especially those arriving from
B Amsterdam, at the baggage collection area KLIA at Carousel 'D'.

[7] PW3 observed that the appellant was carrying a black briefcase (exh. P7) in his right hand and a paper bag in his left hand. He also observed that the appellant took from the baggage carousel 'D' a backpack (exh. P14).
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[8] PW3 decided to detain the appellant for a random check. At the time PW3 detained him, the appellant was carrying the briefcase (P7) in his right hand, a paper bag in his left hand and the backpack (P14) on his shoulder. He also had with him a
D passport (P26), a customs declaration form (P28) and an air ticket (P27).

[9] PW3 then escorted the appellant to the Pejabat Narkotik, Aras 3 KLIA, with the appellant still carrying the briefcase, the
E paper bag and the backpack.

[10] Upon arrival at the Pejabat Narkotik, PW3 carried out an examination of the backpack, the paper bag and the briefcase in the presence of the appellant. The backpack was packed with
F clothings (exh. P14A, P14B, P14C, P14D, P14E and P14F).

[11] When the backpack and the paper bag were being examined the appellant appeared normal and composed. There was nothing incriminating found in the backpack and the paper bag.

G **[12]** Then PW3 proceeded to examine the briefcase (P7). Inside it, PW3 found some clothings like T-shirt, stockings and underwear (exh. P8, P9, P10, P11, P12 and P13). PW3 queried the appellant why these items were in the briefcase and not in the backpack.

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[13] The appellant did not give a logical answer and began to turn pale. This caused PW3 to be suspicious and he made a more thorough examination of the briefcase. He found stitches sewn untidily at the bottom of the briefcase. PW3 cut open the stitches.
I He then found two compartments on both sides of the briefcase into which had been packed whitish powdery and lumpy substances, suspected to be drugs.

[14] The exhibits were seized and a search list (P17) prepared and served on the appellant. The exhibits were subsequently handed over to PW5, the investigating officer of this case.

[15] A cautioned statement (P38) was recorded from the appellant on the same day at about 3.45pm by PW6.

[16] P38 was received as part of the prosecution's evidence, after a trial within a trial to determine whether it had been made voluntarily by the appellant.

[17] Upon analysis, the Chemist, PW4, confirmed the said whitish powdery and lumpy substance to be cocaine with a nett weight of 508.6 grams.

Findings Of The High Court

[18] At the close of the prosecution's case, the learned trial judge was satisfied that the prosecution had proved a *prima facie* case on the charge and the appellant was called upon to enter his defence.

[19] In convicting the appellant at the close of the trial, the learned trial judge in his judgment appearing at pp. 646 - 647 of the Appeal Record, had this to say:

> Based on his own testimony in cross-examination, and his admission in his statement in P38, I find, as a fact, that the accused had at all material times full knowledge of the drugs in P7 and the nature of the drugs, in that they were prohibited drugs, even though he might not have knowledge as to the type of drugs in his possession, that is, whether it was cocaine or otherwise. In the circumstances, actual possession of the drug has been established beyond a reasonable doubt by the prosecution, without having to invoke the presumption under s. 37(d) of the Dangerous Drugs Act 1952. The quantity of cocaine in the possession of the accused is large. It is more than 12 times the minimum prescribed under s. 37(da)(ix) of the Dangerous Drugs Act 1952 for the presumption of trafficking in cocaine.
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> The presumption, under s. 37(da)(ix) of anyone found in possession of 40 gm or more of cocaine to be trafficking in same, is a rebuttable presumption. The accused has not adduced any evidence to rebut the presumption, on a balance of probabilities. The accused did not testify that he was a drug addict. He did not testify that the cocaine was for his own consumption - on the contrary, he testified it was meant for 'Alahadjie' in Bangkok from whom he would be receiving US$3000 to US$4000 upon delivery

A of the same. The accused has failed to rebut the presumption under s. 37(da)(ix) Dangerous Drugs Act, 1952. He had brought the drug, all the way from Amsterdam to Kuala Lumpur, in a hand carry luggage on a MAS flight, with custody, control and actual knowledge of the drug in P7.

B **[20]** From the above passage, it is without doubt, that the learned trial judge had made an affirmative finding of possession independent of s. 37(d) of the Dangerous Drugs Act 1952. Thereafter the learned trial judge had invoked the presumption under s. 37(da)(ix) of the Act to come to a finding that the C appellant was trafficking in the dangerous drugs that he was carrying on that day.

Findings Of The Court Of Appeal

D **[21]** Although the appellant included 11 grounds of appeal in his petition of appeal, the Court of Appeal only heard three grounds.

[22] They are:

(i) Admissibility of statement made under s. 37A(1) of the Act;

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(ii) Possession;

(iii) The learned trial judge had prejudged the issue before hearing the submissions of learned counsel and the DPP at the end of the defence's case.

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[23] For the reasons they have given in their judgment, the Court of Appeal found that they were in entire agreement with the findings of the learned trial judge regarding the grounds of appeal raised. For those reasons they found there was no merit in the G appeal and dismissed the same. The conviction and sentence imposed by the learned trial judge were confirmed.

The Appeal

H **[24]** Before us learned counsel for the appellant raised the same grounds of appeal as raised before the Court of Appeal except the issue on possession.

[25] The first ground is that the learned trial judge had prejudged the case before hearing the appellant's submission as the learned I trial judge's decision was dated on the day the appellant entered his defence and not on the date the actual decision was delivered.

[26] The second ground is related to the cautioned statement under s. 37A(1) of the Act which according to the appellant's counsel should not be admissible as the appellant did not understand the caution administered.

First Ground

[27] Learned counsel for the appellant contended that the learned trial judge had prejudged the issue even before hearing submissions of the learned counsel and the DPP. Counsel alleged that the grounds of judgment was written on 18 January 2005 as reflected at the foot of p. 648 Appeal Record Vol. 2.

[28] The date 18 January 2005 was the date the appellant entered his defence.

[29] After the appellant had entered his defence and been cross-examined by the DPP the learned trial judge fixed 26 January 2005 for submission by parties.

[30] Looking at pp. 140 to 145 of the Appeal Record, we observe that both counsel and DPP did make their submissions on 26 January 2005 and the learned trial judge handed down his decision immediately after that.

[31] It is obvious to us and we agree with the decision of the Court of Appeal that the date 18 January 2005 is a typing error.

[32] Even assuming for a moment that it is not a typing error and the learned trial judge had actually completed his judgment on the 18th, we see no reason why he could not give his decision on the 18th but instead gave his decision on 26th. So logically speaking it must be a typing error. In any case it is normal that a judge will write his judgment after he had handed down the decision ie, in this case after 26 January 2005.

[33] The next question we ask is whether the learned trial judge is obliged to hear submissions from counsel and DPP before he gives his decision?

[34] In other words, is it mandatory for the learned trial judge to hear submissions before giving his decision?

[35] In our judgment it is not mandatory for the learned trial judge to hear submission from learned counsel before giving his decision.

[36] Section 181(1) of the Criminal Procedure Code provides:

> When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) **may sum up his case** ... (emphasis added).

[37] The word 'may' indicates a discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. Therefore the learned trial judge could if he wanted to, decide without having the need to hear submission from defence counsel. Submission is not evidence and hence the judgment is not defective. If the law categorically states that it is not mandatory for counsel to make submission, we can see no reason why it is mandatory for the learned trial judge to hear submission. What, if learned counsel chooses not to make submission? Is the learned trial judge still obliged to call upon learned counsel to make submission? If indeed the law intends that the learned trial judge should hear submission than it would say so in no uncertain terms.

[38] Having perused the notes of evidence of the learned trial judge we observed that the learned trial judge did consider the submission of learned counsel (See pp. 140 - 144 of the Appeal Record Vol. 1). Thus, this fact lends credence to the date 18 January being a typographical error.

[39] We therefore say that there is no basis for learned counsel for the appellant to allege that the learned trial judge has prejudged the matter even before submission is heard and that this has prejudiced the rights of the appellant.

[40] We find that this ground has no merits.

Second Ground

[41] This ground deals with the admissibility of the statement under s. 37A(1) of the Act (P38).

[42] Learned counsel for the appellant contended that the appellant did not give the statement voluntarily and his rights and consequences of giving the statement were not explained to him in his mother tongue ie, Tagalog, and the appellant did not understand the caution administered to him in English.

[43] Learned counsel further contended that P38 should not be admissible and that, without it, the learned trial judge is left with no other evidence to find that the appellant was in possession of the drugs and that the prosecution had made out a *prima facie* case.

[44] With respect to learned counsel, we find that his submission on this ground is totally flawed.

[45] We will now deal with the question pertaining to the language used. Chief Inspector Lee Chee Yong, the first witness in the trial within a trial (TWT PW1) told the court at p. 75 of the Appeal Record Vol. 1, as follows:

> Saya berkomunikasi dengan suspek dalam bahasa Inggeris. Dia faham apa yang saya maksudkan. Beliau faham apa saya cakapkan. Saya ada tanya pada suspek samada beliau mahu seorang jurubahasa Filipina. Beliau kata tidak perlu kerana beliau fasih cakap Bahasa Inggeris.
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> (Translation):
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> I communicated with the suspect in the English language. He understood what I meant. He understood what I said. I did ask the suspect whether he wanted a Filipino Interpreter. **He said no need as he speaks fluent English**. (emphasis added).

[46] From the above it is obvious that the appellant has confirmed that he can understand and speak the English language fluently.

[47] The fact is further confirmed by ASP Maidu bin Abu Bakar who also gave evidence in the trial within a trial as prosecution witness No. 2 (TWT PW2). His evidence appears at p. 91 of the Appeal Record, Vo. 1, as follows:

> Saya tidak tanya suspek samada beliau perlu Jurubahasa Tagalog oleh kerana suspek dan saya bercakap dalam Bahasa Inggeris dan dia fasih Bahasa Inggeris.
>
> (Translation):
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> I did not ask the suspect if he needed a Tagalog Interpreter **as we spoke in English and he is fluent in the English language**. (emphasis added).

[48] In the cautioned statement (P38) appearing at p. 677 of the Appeal Record, Vol. 2, we observed that the appellant chose to speak in the English language when asked by the recording officer in which language he would like to speak.

[49] In the trial within a trial, when cross-examined, the appellant told the court that he spoke in 'Broken English' when he was in Amsterdam. This suggests that the appellant can understand the English language.

[50] Accepting and admitting the cautioned statement the learned trial judge, in his judgment at p. 638 of the Appeal Record, Vol. 2 had this to say:

> The cautioned statement (P38) was received as part of the prosecution's evidence, after a trial within a trial to determine whether it had been made voluntarily by the accused. On the evidence before me, I was entirely satisfied the said statement was voluntarily made by the accused. I was entirely satisfied there was no inducement, threat or promise for making the statement. **I was also satisfied that the accused was indeed able to communicate with SP6 in English, and the absence of a Filipino interpreter did not render the statement of the accused inadmissible in law**. (emphasis added).

[51] This is certainly a strong finding of fact made by the learned trial judge. The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. We agree with the Court of Appeal that once a trial judge has come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle or the learned trial judge had clearly and wrongly evaluated the facts.

[52] Having regard to the general principles applicable to *voire dire* hearing and in the absence of a distinct and material error of principle we are reluctant to interfere with the finding of fact by the learned trial judge and confirmed by the Court of Appeal. It is therefore our considered view that the ruling on the admissibility of the cautioned statement (P38) by the learned trial judge was a correct one.

[53] It is said often enough that the finding of facts is a matter for the trial judge.

[54] In *Public Prosecutor v. Munusamy* [1980] 1 LNS 63, the Federal Court had occasion to deal with the issue of concurrent findings of fact and had this to say:

> ... Where there have been concurrent findings of facts in the lower Courts it should not be made a practice in the appeal Court to review the concurrent findings of facts unless it is shown there was no evidence to support the inferences drawn in the lower Courts. (See also *Tan Kim Ho & Another v. PP* [2009] 3 CLJ 236).

[55] Indeed we find that there is no infirmity whatsoever in the concurrent findings of facts by the learned trial judge and the judges of the Court of Appeal which would require our appellate interference.

[56] We find that learned counsel's submission on this ground is also devoid of merits.

Conclusion

[57] For the reasons we had given earlier we are unanimous that this appeal failed. We would therefore affirm the order of conviction and sentence by the Court of Appeal.

[58] In the event the appellant's appeal against conviction and sentence is hereby dismissed.